1943 *Present :* **Howard C.J. and Keuneman J.**

RAJAH, Appellant, *and* NADARAJAH *et al.*, Respondents.

160—D. C. Kandy 141.

Deed of transfer—Transfer to evade creditors—No contract of sale—Want of mutuality—Benami transaction.

Where a person executed a deed in favour of his minor son in the form of a transfer merely in order to put his property beyond the reach of his creditors and where the transferor remained in possession of the property;—

Held, that the transaction did not operate as an instrument of sale so as to give the son title to the property, owing to want of mutuality.

Held, further, that if the instrument be regarded as a donation it would be inoperative as there has been no acceptance on behalf of the minor or delivery of the property to him.

THE plaintiff a minor, by his next friend, instituted this action for declaration of title to one-third share of certain premises. He claimed title on a transfer P 3 from his father, the original added-defendant. The 2nd defendant in his answer pleaded that the deed P 3 was null and void as it was executed in fraud of creditors and that the added defendant had remained in possession of the property after the execution of P 3. The 2nd defendant claimed that he was entitled to the property

[1] *6 C. L. Rec. 99.* [2] *15 N. L. R. 111.*

by virtue of a Fiscal's transfer D 31 of 1929 in his favour, the property having been sold in execution against the added-defendant. The District Judge held that the 2nd defendant was entitled to have the deed P 3 set aside and that prescription did not run against him.

N. E. Weerasooria, K.C. (with him *L. A. Rajapakse* and *C. Renganathan*), for plaintiff, appellant.—In this case there is a competition between a deed of transfer (P 3), executed by one Ambalavanar in favour of plaintiff, and a Fiscal's transfer in favour of 2nd defendant. The District Judge held that 2nd defendant was entitled to have P 3 set aside because it was executed in fraud of creditors and that prescription did not run against him. His view was that the right to have P 3 set aside arose only when 2nd defendant's rights were challenged by plaintiff inasmuch as 2nd defendant was in possession of the land in dispute. It is submitted that this view as regards prescription is incorrect. A Paulian action is prescribed in three years from the cause of action—*Podisingho Appuhamy v. Lokusingho* [1]. The cause of action is the alienation sought to be impeached. In case of concealed fraud the cause of action arises when party impugning the deed becomes aware of the fraud, *Fernando v. Peiris* [2]. Bonser C.J.'s *dictum* regarding "cause of action" in *Podisingho Appuhamy v. Lokusingho* (*supra*) was explained by Garvin J. in *Fernando v. Peiris* (*supra*). In the present case the 2nd defendant was not merely aware of the fraud at the time of alienation but was in fact a party to it. There is therefore no question of concealed fraud. As regards concealed fraud see *Dodwell & Co., Ltd., v. John* [3]. It is further submitted that no relief should be given to 2nd defendant because he participated in the scheme to defraud creditors.

N. Nadarajah, K.C. (with him *C. E. S. Perera* and *P. Navaratnarajah*), for 2nd defendant, respondent.—It is submitted that P 3 is void for two reasons: firstly, it was executed in fraud of creditors; and, secondly, it purports to be a transfer which, viewed as a donation, is void for want of acceptance, and which, viewed as a sale, is void for want of mutuality.

On the first ground it is submitted that no cause of action arose till assertion of title. When a party is in possession on what he thinks is a good title and continues to possess the term "cause of action" must be considered in that light. As regards the right of an execution-purchaser who is a creditor to bring a Paulian action see *Suppiah Naidu v. Meera Saibo* [4]; *Mohamedo v. Manupillai* [5]; *Vallipuram v. Vallipuram* [6]; and *Punchi Appu v. Aralis Appu* [7], where the final view was stated. *Voet* supports the view of Bonser C.J. in *Podisingho Appuhamy v. Lokusingho* (*supra*) that the cause of action arises not at the time of execution of the deed but when it becomes clear that the effect of the deed will be to defraud creditors—*Voet, XLII 8, 13* (*De Vos' Trans*). See also *Fernando v. Fernando* [8]; *Muttiah Chetty v. Mohamed Hadjiar* [9]. The cause of action arose when plaintiff filed action and therefore 2nd defendant's claim for relief is not prescribed.

[1] *(1900) 4 N. L. R. 81.*
[2] *(1931) 33 N. L. R. 1.*
[3] *(1918) 20 N. L. R. 206.*
[4] *(1907) 3 Bal. 129.*
[5] *(1916) 3 C. W. R. 19.*
[6] *(1930) 7 Ceylon Times 99.*
[7] *(1934) 37 N. L. R. 141.*
[8] *(1924) 26 N. L. R. 292.*
[9] *(1923) 25 N. L. R. 185.*

On the second ground, it is submitted that absence of acceptance vitiates the contract of donation—*Kanapathipillai v. Kasinather* [1]. As to who can accept on behalf of a minor see *Fernando v. Alwis* [2]. Where a real transaction takes the form of a gift then in order to be valid it should have the ingredients of a gift. The Court must inquire into the substance of the transaction—*de Silva v. de Silva* [3]. The transaction here is not a sale as there was neither consideration nor *consensus*—*Wessels: Law of Contract, in South Africa, Vol. II., p. 1197.* The transaction as disclosed by P 3 is therefore neither a valid sale nor a valid donation. P 3 is thus a nullity. See further *35 Indian Appeals 98; A. I. R. (1916) Privy Council 27 at pp. 30, 31.*

N. E. Weerasooria, K.C., in reply.—Acceptance need not appear on the face of the deed—*Walter Pereira (1913 ed.) p. 605.* The principle of necessity of acceptance is not applicable where the form of the transaction is a transfer. See *Jayawardana v. Amerasekera* [4].

Cur. adv. vult.

July 23, 1943. KEUNEMAN J.—

The plaintiff, a minor, by his next friend, instituted this action to be declared entitled to one-third of the premises described in the schedule to the plaint. He claimed title on a transfer P 3 of 1927 from his father, the original added-defendant, and alleged that the 2nd defendant had entered into possession in 1932, and that the 1st defendant was the lessee of the 2nd defendant, and was in occupation of the premises. The action was instituted in 1938, and the plaintiff claimed mesne profits for 3 years before that date. The 2nd defendant in his answer alleged that the deed P 3 was null and void as it was executed in order to defraud creditors, and that the added-defendant had remained in possession of the property after the execution of P 3. He added that P 3, although in form a deed of transfer, was in fact a donation, the plaintiff at the time being 7 or 8 years old—in fact he attained majority in 1939. He further stated that added-defendant in any case could not gift more than half of this to the plaintiff, as the premises in question were part of the *thediatetam* property.

The 2nd defendant claimed that he was entitled to the property by virtue of a Fiscal's transfer D 31 of 1929 in his favour, the property having been sold in execution against the added-defendant.

A number of issues were framed, of which the following may be mentioned:—

4. Did any consideration pass from plaintiff to Ambalavanar (added defendant) on P 3?
5. Was P 3 executed by Ambalavanar with intent to defraud his creditors?
6. Did the said transfer render Ambalavanar unable to meet his creditors?
8. (*a*) If issues, 4, 5, and 6 or any of them is answered against the plaintiff, is the 2nd defendant entitled to have the said deed set aside?
8. (*b*) Does any title pass to the plaintiff on the said deed?

[1] *(1937) 39 N. L. R. 544.*
[2] *(1935) 37 N. L. R. 201.*
[3] *(1937) 39 N. L. R. 69 at p. 71.*
[4] *(1912) 15 N. L. R. 280 at p. 282.*

12. If issue 4 is answered in the negative, is the said deed P 3 valid to convey title inasmuch as it has not been accepted by the plaintiff or on plaintiff's behalf ?

13. Is the 2nd defendant's claim to have P 3 set aside barred by prescription ?

Further issues were also framed with regard to the alleged estoppel operating against the 2nd defendant.

The facts of the case, as held by the District Judge, are as follows :—

The added defendant, Ambalavanar, had carried on business for a very long period. At first the business prospered, but eventually it failed, and his creditors began to sue about 1927. Added-defendant desired to put his properties beyond the reach of his creditors, in order to defraud them. He accordingly executed several deeds, transferring his lands in Gampola to his sons, and his business there to his brother-in-law, and transferring or mortgaging his lands in Jaffna to his daughters. These deeds were executed at various times but were all part of one scheme of fraud. It is clear that the whole of this fraud was carried through on the advice and with the active co-operation of the 2nd defendant, who was the son-in-law of added-defendant, and so the brother-in-law of plaintiff. After the transfers added-defendant had no means whereby to pay his creditors.

Apparently at this stage the 2nd defendant heartily approved of the fraud, but he later feared that the scheme might fail as against the creditors. The added-defendant owed the 2nd defendant himself a sum of nearly Rs. 12,000, and a promissory note, which was probably ante-dated, was prepared for Rs. 12,000, and the 2nd defendant sued on it, obtained judgment and proceeded to execution. As a result these premises were sold and purchased by the 2nd defendant. All through this period, the added-defendant and the 2nd defendant acted together, in pursuance of an understanding, whereby added-defendant was to pay the amount due to 2nd defendant, and in fact payments were made in accordance with this understanding. The 2nd defendant, however, appears to have gone into possession of these premises about the time of the sale to him.

The District Judge held in these circumstances that the 2nd defendant was entitled to have the deed P 3 set aside, and that prescription did not run against him. He, however, deprived the 2nd defendant of his costs, because " he was the most untrustworthy among a pack of untrustworthy witnesses ".

There can be no doubt that the stricture passed by the Judge upon the 2nd defendant and the added-defendant are thoroughly deserved, and there can be no question that they were both deeply involved in a scheme, intended to defraud other creditors. That scheme appears to have succeeded.

There is one matter decided by the District Judge which is open to serious question—and that is his finding on prescription. He held that as long as the 2nd defendant was in possession of the land and appropriated the income from it, there was no reason for him to challenge the

deed in favour of the plaintiff. He added that the effect of the plaintiff's deed to defraud the 2nd defendant arose only when the plaintiff on the strength of that deed challenged the defendant's rights.

No authority has been cited by the District Judge or by Counsel in support of this finding. As far as the defendant's possession is concerned, it was no doubt open to him to plead that possession had given rise to a title by prescription in his favour. But in this case such a plea was not available because the possession did not extend to ten years and the plaintiff was a minor even at the date of action. In this case, however, we are not dealing with prescription as a means of acquiring title, but in the sense of limitation of action and the question we have to consider is whether the action was brought within the time laid down. In *Podisingho Appuhamy v. Lokusingho et al.*[1], where the fraudulent transfer had comprised the whole of the debtor's property, and where the plaintiff had knowledge of the fact, it was held by Bonser C.J. and Moncrieff J. that prescription began to run from that date. Prescription was complete within 3 years from the date. In *Fernando v. Peiris*[2] Garvin A.C.J. pointed out that a Paulian action is prescribed in 3 years from the cause of action. The cause of action is the alienation which it is sought to impeach, as being in fraud of creditors. In a case of concealed fraud, the cause of action arises where the fraud came to the knowledge of the party impugning the deed.

In this case not only was the 2nd defendant aware of the fraud, at the time of the alienation, but he was the architect and builder of the edifice of fraud. Even if we take the date on which he became a puchaser, viz. : in 1929, he was then in full possession of all the facts. Concealed fraud could neither be proved nor alleged in this case. No act has been at any time done by the plaintiff, which prevented the 2nd defendant from bringing an action to set aside deed P 3 earlier, and the principle laid down in *Muttiah Chetty v. Mohamood Hadjiar*[3], does not apply. The most that can be urged is that the 2nd defendant did not choose to bring this action earlier, because the plaintiff happened to be a minor, and did not disturb his possession. I do not think that can affect the question of the time limited for bringing the action.

I hold that the decision of the District Judge on the question of prescription cannot be supported. In view of my finding on this point, it is unnecessary to consider the further argument addressed to us that in consequence of the 2nd defendant's participation in the fraud, no relief should be extended to him.

I find that the 2nd defendant's claim to have the deed P 3 set aside is prescribed and must be dismissed. The ground on which the District Judge gave judgment for the 2nd defendant therefore fails.

It was, however, argued for the 2nd defendant that the District Judge has wrongly decided issue 12. The argument is as follows :—The deed P 3 cannot be regarded as a deed of sale, and can at most be regarded as a donation. But it must fail as a donation, because it has not been accepted by or on behalf of the plaintiff. The District Judge answered this argument as follows :—P 3 is not a deed of gift on the face of it. Therefore it is valid to convey title, though there is no acceptance of it

[1] *4 N. L. R. 81.* [2] *33 N. L. R. 1.* [3] *25 N. L. R. 185.*

by the plaintiff. It was further argued before us that there has been delivery of the deed to the minor, and that this constituted acceptance by the minor. It is true that in re-examination the plaintiff said "Deed P 3 was all along in the possession of my father till he handed it to me in 1936 or 1935. I have lost the original deed. I told father about the loss and he obtained for me this certified copy P 3." The District Judge has not stated that he accepted this evidence, and it is not possible for us to accept it. The alleged loss of the original of P 3 is not fully explained, and it is doubtful that plaintiff ever had the deed. The failure to produce the original deed tells against him. This evidence came at a point when the plaintiff had begun to realize the pinch of the case, and was not given in examination-in-chief. Further the whole course of the transaction by the added-defendant showed that he never regarded his son, the plaintiff, as the owner of the property, but had merely made fraudulent use of the plaintiff's name, in order to defeat the creditors. Further the alleged date of the delivery of the deed was after the purchase by the 2nd defendant.

I think the District Judge has failed to appreciate the real inwardness of issue 12. What is contended is that P 3 cannot be regarded as a sale to the plaintiff, not only because the consideration has been shown to be false, but also because there was no mutuality between the added defendant and the plaintiff. Plaintiff never existed as a party to the contract. "In a contract of sale there must be complete agreement as regards the nature of the transaction, the thing sold and the price (*consensus, res or merx et pretium*) (*Voet XVIII. 1.1.*) . . . . The parties must mutually agree that the one is to sell and the other is to buy . . . . It is not enough that the parties call the transaction a sale ; the circumstances must show that the parties in reality entered into a true contract of sale". (*Wessels : Law of Contract in South Africa, Vol. II., p. 1197.*) Now it is clear in the present case that there was no *consensus* between the plaintiff and the added-defendant. The whole transaction must fail as a sale or a contract of sale for want of mutuality. Further the surrounding circumstances show that it was never intended by the added-defendant that the deed P 3 was to become operative. The deed was merely a device for putting his property beyond the reach of his creditors. It was something very closely akin to the *benami* conveyance in *Peterpermal Chetty v. Muniandy Servai'* and as Lord Atkinson said, "A *benami* transaction is not intended to be an operative instrument."

The only ground therefore on which plaintiff can hope to give validity to the deed P 3, is by contending that it was a donation by the father to the son. But even regarded as a donation, the deed is inoperative as it has not been accepted by the plaintiff, and there has been no delivery of the property to the plaintiff by the added-defendant.

I accordingly hold that the form given to the transaction will not be the governing consideration. It is clear that as a sale, P 3 cannot be regarded as valid, for the reasons I have mentioned, and accordingly the fact that P 3 was drafted in the form of a deed of sale, cannot give it any validity which it would not otherwise have. It is possible, however, for us to examine what the true nature of the transaction was. The

[1] *35 I. A. 98 ; 35 Cal. 551.*

only contract which could validly have been intended was the contract of donation. But as a donation, P 3 must also fail for want of acceptance. I am therefore driven to the conclusion that P 3 was invalid, and did not convey title to the plaintiff.

The order I make in this case is as follows :—I delete from the judgment and decree of the District Judge the words "the Deed, P 3 is hereby set aside", but I affirm the order that the plaintiff's action is dismissed. The order of the District Judge as regards costs in the Court below is affirmed, and the 2nd defendant is not entitled to costs of the action.

A great deal of time was taken up in appeal in discussing the question of the setting aside of deed P 3, and the question of prescription relating to it. On this point the 2nd defendant has failed. Further the very unscrupulous manner in which the 2nd defendant has acted throughout should, in my opinion, also be taken into consideration. I do not think the 2nd defendant is entitled to the costs of appeal, and the appeal will therefore be dismissed without costs, subject to the variation I have mentioned.

HOWARD C.J.—I agree.

Appeal dismissed.